

# In Your Defense



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*The Partners from left to right, top to bottom: Douglas McIntosh, Robert Peltz, Carmen Cartaya, Carol Finklehoffe, James Sawran, Terese Latham, A. Candace Marcus.*

## **BIG WINS!** MANAGING PARTNER LEADS MSPC DIVISIONS TO MULTIPLE VICTORIES



The trial team of Managing Partner Douglas McIntosh, Senior Associate Michael Barzyk, Legal Assistant Delle Lenzen, and Legal Nurse Consultant Pamela Parks, mediated a catastrophic brain injury case. Coupled with four other claimants' damages claims arising from a multiple impact automobile accident, the case presented considerable exposure to the client and its excess carrier. By promptly and thoroughly scrutinizing all medical records and life care plans and obtaining expedited expert medical review of the variety of injuries that would have exceeded coverages available to the Defendant, the team mediated the case at an early stage of the proceedings. A complete settlement of all claims, well within the available coverage afforded to the De-

fendant, was obtained. Mr. McIntosh's expertise, gained through participation in more than 1,000 mediations, enabled him to lead his team in early and effective mediation of catastrophic injury claims.

In a separate matter, Mr. McIntosh, Senior Associate Robert Weill, Ms. Lenzen and Legal Assistant Michael Damiano successfully concluded a multi-million dollar insurance coverage dispute pending in the Federal Court in North Carolina. MSPC was lead counsel for two excess carriers in a case scheduled for a three week trial. The case was litigated for several years but resulted in a successful resolution and an excellent outcome for the MSPC clients without need for prolonged trial. MSPC, with expertise in insurance coverage

and significant exposure events, serves its clients throughout Florida and in other states as Pro Hac Vice counsel.

In a third matter, the trial team of Mr. McIntosh and Certified Legal Assistant Pamela Lamirande succeeded in vacating a default for a client and its insurer. What could have been a significant judgment, based upon a recorded default that was of record for considerable time, was avoided by immediate and aggressive court filings upon receipt of the call to action. This now allows MSPC's client and its insurer to address the case on its merits in State Court.

In addition, three catastrophic injury claims arising from an explosion case pending in Volusia County Circuit Court were concluded by the trial team of Messrs. McIntosh and Barzyk, Ms. Lenzen and Legal Nurse Consultant Robin Brant. After two years of litigation, MSPC was substituted in as Lead Counsel in this Insurance Defense/Products Liability matter involving two deaths and catastrophic injuries to a third Plaintiff. Through aggressive liability defense and thorough analysis of medical and life care plans by the MSPC trial team and its retained experts, the case was successfully concluded at mediation on very favorable terms for the client and its insurance carrier.

Mr. McIntosh, resident in the Fort Lauderdale office, heads up the Firm's Insurance Defense/Products Liability, Insurance Coverage/Bad Faith and Construction Defect Litigation Divisions. To obtain further information about this article, please feel free to contact Mr. McIntosh. His contact information, along with that of all MSPC attorneys, is provided at the end of this publication.

### MSPC MARITIME DIVISION SECURES FULL RECOVERY IN LARGE FIRE LOSS



Miami Partner Robert Peltz, head of MSPC's Admiralty and Maritime Division, together with Messrs. McIntosh and Weill, recently investigated, retained experts, worked up, negotiated and settled a mega yacht fire damage claim in excess of \$25 million on behalf of the owner. The 161-foot ultra luxury yacht caught fire during the course of sea trials performed by contractors as part of routine scheduled maintenance. MSPC was hired by the owner to assure that the claim was properly presented to foreign underwriters.

The engine room was subject to severe fire damage, destroying both engines and melting the electrical wires for the entire yacht. The living and recreational areas of the yacht sustained significant smoke damage, which could not be remediated due to the resulting chemical interaction with the vessel's extensive millwork, silk wall covering, underlying wooden frames and soft goods.

Following the work-up of an extensive proof of loss, accompanied by expert affidavits, reports and other

supporting documentation, the underwriters accepted the owner's constructive total loss claim.

MSPC's Admiralty and Maritime Division handles first-party and third-party maritime casualty claims, and is available for consultation in this highly skilled practice arena. Feel free to contact Mr. Peltz for further information about this article, as well as the MSPC Admiralty and Maritime Division.

### PRACTICE TRENDS

#### MSPC TRACKS EXPONENTIAL RISE IN CHINESE DRYWALL CLAIMS AND POTENTIAL REMIEDIATION COSTS

The avalanche of claims, litigation, and insurance coverage disputes in the aftermath of Chinese drywall construction in the United States continues to build momentum. Experts indicate that between remediation costs, litigation costs and the loss of valued homes, Chinese drywall is a \$15-\$25 billion dollar problem. Whether it is on a personal or professional basis, everyone will somehow be impacted by the Chinese drywall disaster that has gripped our already vulnerable housing market. While Chinese drywall has been used and discovered in 24 states, approximately 77 percent of the reported cases involve Florida homes. Between 2004 and 2008, shipping records indicate over 500 million pounds of Chinese drywall and plasterboard was imported into the U.S. Eleven million pounds of Chinese drywall came through Port Canaveral, Florida in 2006 alone.

Unlike domestically manufactured drywall, it has been reported that Chinese drywall contains volatile sulfur compounds and fly ash, a coal byproduct. When these particles are exposed to moisture, including humidity, the Chinese dry-

wall emits sulfur dioxide and other gases resulting in noxious odors similar to rotting eggs.

Affected homeowners have alleged that the drywall defect has resulted in both structural problems in their homes and physical ailments in their families. The results of health impact studies analyzing exposure to strontium and carbon sulfide are due later this year. Many homeowners who live in large residential developments have banded together to file class action lawsuits against developers, contractors and manufacturers of defective drywall. A multi-district Federal class action has already been certified in Louisiana. Direct litigation has, in turn, spurred insurance coverage disputes wherein carriers are denying coverage based on pollution exclusions contained within their policies.

Litigation over Chinese drywall will continue for many years to come. Unfortunately, the financial impact of Chinese drywall may not be limited to property damage and remediation claims. If further investigation and scientific studies establish a supportable link between illnesses and the gases emitted by the drywall, bodily injury claims may manifest themselves over the next few decades, similar to asbestos and other toxic-tort litigation with which our court systems have been inundated. We have only seen the beginning of the problems we are likely to encounter as a result of the importation and use of tainted Chinese drywall in construction throughout the United States, and especially in Florida.

For more information on this topic, please feel free to contact Mr. Barzyk, the author of this article. He is resident in the Firm's Fort Lauderdale office, and is part of its Construction Defect Litigation Division, as overseen by Mr. McIntosh.

### MEDICARE'S NEW REPORTING REQUIREMENTS

Pursuant to Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA), beginning January 1, 2010, insurers and self-insured entities will be required to report claims made by Medicare-eligible claimants to the Centers for Medicare and Medicaid Services (CMS) and will be subject to a \$1,000 daily fine for late reporting. The same entities will be subject to double damages if they fail to satisfy Medicare's lien when monies are paid to a claimant through settlement, judgment or otherwise.

By imposing this mandatory reporting requirement on Responsible Reporting Entities (RREs) Medicare hopes to increase its ability to identify individuals who received Medicare payments and to recoup an estimated \$1.74 billion of benefits that RREs should have paid. While this practice has been required in workers' compensation matters for decades, its application to civil cases has dramatic implications. Counsel for self-insureds, insureds, and plaintiffs must remember that Medicare is a secondary payer for any medical care and has an absolute right to reimbursement from RREs that should have paid such expenses. These new requirements will complicate the consummation of settlements and present a possible risk of future liability against all parties, including counsel, if Medicare's lien is not satisfied.

Given the new reporting requirements, discovery in liability litigation must be tailored to obtain key information from plaintiffs. Likewise, both pre-trial and post-trial procedures must be tailored toward the new law. For example, verdict forms should apportion the amount of the award between medical benefits (future

and past) and non-medical benefits (e.g., lost wages).

The new reporting requirements and Medicare's broad right to enforce its right to reimbursement will also require RREs to protect themselves from liability to Medicare if the claimant does not reimburse Medicare. Some tools suggested by practitioners include: (a) using multi-party settlement drafts which require the Medicare beneficiary, private payees, and Medicare to endorse the check; this should be negotiated as a condition of settlement since it may substantially delay the plaintiff from receiving any money given Medicare's processing time; (b) issuing multiple checks - a multi-party check to cover the anticipated Medicare recovery amount and another one to the beneficiary and his or her representative; (c) issuing a separate check to Medicare; and (d) demanding that claimant agree to hold harmless and indemnify the RRE for any Medicare liens as well as escrow the settlement funds until Medicare's lien has been satisfied (this may only insulate the RRE from the single damages not the double damages that can be recovered by Medicare).

For further information about this subject, please feel free to contact the author of this article Fort Lauderdale Senior Associate Robert C. Weill, who oversees the Firm's Appellate/Litigation Support Division.

### CHAPTER 558 AMENDMENTS EXAMINED

Florida's mandatory Construction Defect Alternative Resolution Process, as set forth in Florida statutes, Chapter 558, was significantly amended October 1, 2009. The amendment applies to all construction contracts executed on or after that date. There was much confu-

sion in applying prior versions of the statute insofar as whether or not the Chapter 558 Notice language was, in fact, "required" to be incorporated into construction contracts. The new amendment includes a statement that, "The failure to include in the contract the notice provided in this subsection does not subject the contracting Owner, contractor, or design professional to any penalty. The purpose of the contractual notice is to promote awareness of the procedure, not to be a penalty." [1] Thus, while the Notice language remains part of the statute, the amendment establishes that there are no legal consequences or independent action arising from the omission of the required statutory notice in construction contracts.

It is clear that the legislature intends that the statute apply to all construction defect cases, regardless of whether or not the notice language is included in construction contracts. However, omission of the required Chapter 558 notice language from construction contracts incurs "no penalty" under the amendment. In fact, the amendment provides the first "opt-out" provision, thereby permitting contracting parties to agree in writing not to follow the statutory scheme. Other significant changes include the requirement that a project reach substantial completion before the statute can be invoked, and the imposition of a new deadline for parties to exchange all discoverable information.

All recipients of a Chapter 558 Notice under the amended statute should be aware of these significant changes and respond quickly to preserve their entitlements.

The author of this article is Ms. Crystal L. Arocha, an Associate in the Fort Lauderdale office. She works in the Firm's Construction Defect Litigation Division under the

direction of Mr. McIntosh. To discuss this matter at greater length, please feel free to contact Ms. Arocha.

[1] 558.005(6) Fla. Stat. (2009).

## OF SERVICE

### DOUGLAS MCINTOSH TO LEAD NATIONAL SEMINAR ON BEST PRACTICES

Mr. McIntosh has been selected to Chair the "Best Practices for Law Firm Profitability Seminar", for DRI, The Voice of the Defense Bar, in New York City on December 3-4, 2009. The program was created in response to the DRI's 2009 "Future of Litigation" report, and will seize upon the need identified to educate defense lawyers around the country on developing skill sets necessary for a competitive litigation practice in 2010 and beyond. The seminar will combine speakers from defense firms as well as leading panel of in-house counsel for national insurers and businesses, with interactive presentations on such provocative subjects as alternative fee arrangements, requests for proposal for legal services, and living litigation plans and budgets for both sides of the litigation case relationship.

Please feel free to contact Mr. McIntosh for further information about this important seminar.

### MSPC PROVIDES CONTINUING EDUCATION FOR LARGE AUTO AND HOMEOWNER INSURER

Insurers are beginning to notice a rise in the number of bad faith claims being filed in the State of Florida. In general, bad faith is the breach of a covenant of good faith that exists in every insurance contract. With regards to insurance contracts, such a breach may serve as the foundation for a tort action. In Florida, insurance bad faith may be based on denial, underpayment or

delay in payment of a viable claim, and may be applicable in both first and third-party situations. West Palm Senior Associate Camille Blanton and Mr. Damiano, a former Claims Adjuster resident in Fort Lauderdale, will provide a continuing education course to claims adjusters for a large auto and homeowner insurer in November. Their presentation will include an update on insurance bad faith law in Florida and an interactive discussion as to how claims adjusters and attorneys can collaborate to prevent bad faith claims, protect themselves in the event that litigation ensues, and better serve insureds. Blanton and Damiano hope to encourage and facilitate more frequent and effective communication between attorneys and claims examiners and their insureds.

Ms. Blanton, the author of this article, is also a member of the Firm's Insurance Coverage/Bad Faith Litigation Division. Feel free to contact her for more information about this topic and the Firm's services.

### MCINTOSH LEADS DRI'S 2009 INSURANCE ROUNDTABLE

Mr. McIntosh served as Chair for the 2009 Defense Research Institute Insurance Roundtable in Dallas, Texas, in June. DRI holds the Roundtable each year in order to bring defense bar leaders together with insurance carriers and risk management leaders, from around the country, to explore and develop common areas of interest or concern between the defense bar and the insurers they represent.

Please feel free to contact Mr. McIntosh for additional information about DRI, as well as its committees and programs.

**WHO'S WHO?****MSPC PARTNER LEADS EXPANSION OF CENTRAL FLORIDA OFFICE**

Partner Terese "Teri" Latham has always maintained a vision for the Firm's success in Central Florida. Upon her arrival in 2005, Ms. Latham opened the Orlando/Maitland office with the support of the Firm's Executive Committee, as well as the rest of her South Florida Partners. The office has enjoyed successful operations throughout her tenure.

Although geographically the farthest from the Fort Lauderdale headquarters, this Central Florida office is closely aligned to the other three offices and is equally committed to the Firm's mission of providing quality legal services. Teri and her team of qualified professionals have steadily built a practice that is accessible, responsive and knowledgeable.

A native Floridian, Teri was born in Fort Lauderdale and graduated from the University of Florida. She then headed to Birmingham, Alabama, and received a juris doctorate from Cumberland School of Law at Samford University in 1987. Teri re-

turned to Florida to practice law. She began her career as a prosecutor, trying a hundred cases to jury verdict. Over the ensuing years, Teri has handled healthcare litigation throughout Florida, representing hospitals, physicians, dentists, nursing homes and other healthcare providers in medical malpractice and other related areas. She also handles administrative issues with healthcare professionals, including licensing, medical staff and peer review matters.

One of the many services that Teri provided to her clients includes Mock Trials. Teri routinely provides these mock trial presentations at medical facilities in Central and North Florida. The Mock Trial focuses on the impact of medical record documentation on medical negligence litigation.

Teri believes that team work is most important. Team work is the epicenter of a good trial practice. Launching new strategies on her cases as well as innovative ways to reduce costs for clients are most important for her. Teri has two key business lessons learned over her years of practice: the business relationship and a driving perseverance.

Teri is a member of the Florida Bar Association, Orange County Bar Association, Defense Research Institute (DRI), Florida Defense Lawyers Association (FDLA), Florida Academy of Healthcare Attorneys, and the Florida Hospital Association. She has lectured on all aspects of healthcare matters to hospital risk managers, physicians, and nurses. In addition to handling healthcare matters, Teri has qualified as a Proctor in Admiralty, with the Firm serving as appointed defense counsel to several large cruise companies.

She is admitted to practice in the State of Florida, as well as the U.S. District Court for the Northern, Middle and Southern Districts of Florida, and the U.S. Court of Appeals, Eleventh Circuit.

Teri's vision, congruent with that of the Firm, is to grow and diversify the Central Florida office by cross-marketing with other lawyers, as well as those in the Firm's South Florida offices. In this fashion, Teri and her Partners continue to enhance service capabilities to the Firm's valued clients throughout Florida, as well as in other regions of the country.

To discuss services in Central Florida, please feel free to contact Teri directly.

**MIAMI PARTNER LAUNCHES INAUGURAL ISSUE OF MARITIME LAW ASSOCIATION NEWSLETTER**

Mr. Peltz has recently overseen the publication of the inaugural issue of the Maritime Law Association Cruise Lines and Passenger Ships Committee Newsletter. He serves as Chair of the Cruise Lines and Passenger Ships Committee comprised of some 50 members. Assistance with layout and graphic design was provided by Ms. Lamirande, who is also resident in its Miami office. This newsletter has been designed as a means of communicating to committee members year-round and throughout the country. It provides a forum for the useful discussion of issues affecting the industry, as well as a vehicle for sharing periodic updates on maritime legal issues. Through this level of synergy, committee members are better able to service clients by providing important and timely information designed to enhance communication, and create a successful partnership between the two. The inaugural edition

includes articles written by Mr. Peltz, as well as fellow Committee Member Carol L. Finklehoffe, a Partner in the Firm's Miami office, who works closely with Mr. Peltz in the Admiralty and Maritime Division. Please feel free to contact Mr. Peltz or Ms. Finklehoffe for more information about this subject.

**MSPC ATTORNEYS PUBLISHED  
IN NOVA LAW REVIEW**

Messrs. Peltz and Weill have published their article entitled "Corporate Representative Depositions: In Search of a Cohesive & Well-Defined Body of Law" in the Spring 2009 edition of the Nova Law Review.

The article focuses on the permissible scope of corporate representative depositions, designation of the areas of inquiry and selection of corporate representative. Copies of the article are available upon request. To obtain more information on this subject, please feel free to contact Messrs. Peltz and Weill.

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# In Your Defense Newsletter

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The hiring of an attorney is an important decision and should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.

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